STATE OF MICHIGAN

COURT OF APPEALS

BLAKE HURLEY,

Plaintiff-Appellee,

v

L'ANSE CREUSE SCHOOL DISTRICT,

Defendant,

and

JOE POLITOWICZ,

Defendant-Appellant.

UNPUBLISHED
July 25, 2013

No. 310143
Macomb Circuit Court
LC No. 2011-001478-NO

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

In this suit to recover damages for the aggravation of an injury, defendant Joe Politowicz appeals by right the trial court's orders denying his motions for summary disposition premised on governmental immunity. On appeal, Politowicz argues that the trial court should have dismissed plaintiff Blake Hurley's complaint because, even accepting Hurley's version of events as true, no reasonable jury could find that Politowicz's actions amounted to gross negligence that was the proximate cause of Hurley's injuries. Because we conclude that the trial court properly denied Politowicz's motions, we affirm.

I. BASIC FACTS

Hurley injured his left knee while playing paint ball just a few days before the start of the 2007 to 2008 school year. In a letter to Hurley's lawyer, one of Hurley's later physicians, Dr. Ronald Meisel, related that Hurley's patella had become dislocated in the initial incident, but that it did not appear to be fractured.[1] Hurley's first physician elected to treat the injury by placing

[1] We have used Meisel's letter to Hurley's lawyer to provide some medical background to this case. However, by doing so, we do not suggest that this letter would be substantively admissible at trial or for purposes of summary disposition.

Hurley's leg in a full-leg immobilizer. Hurley stated that his physician also restricted his activities; he was not to bend his knee, bear weight on it, or stand for prolonged periods.

Hurley began his tenth grade year at a high school in the L'Anse Creuse School District on September 5, 2007. Prior to that time he had been homeschooled. Hurley testified at his deposition that he and his mother met with the school's principal, Dave Jackson, and Politowicz, who was his gym teacher, on the first day of school. They discussed his restrictions and the principal got a student to assist Hurley with carrying his books.

Hurley said that for the first few gym classes he just sat and watched because he was unable to participate. However, after passing a few classes in this way, Politowicz warned Hurley that he "needed to do something in the class" or Politowicz "was going to have to fail" him. Politowicz explained that he needed to do some sit-ups or something. Hurley told him that he did not think that he should be doing anything: "I believe I told him I should not be doing these things, [because] I could injure myself more." Politowicz responded that Hurley "had to participate" or he "was going to fail the class." At that point, Hurley decided to do some sit-ups "just to get him off my back."

Hurley got down on the floor next to the bleachers. He bent his legs to the degree that his immobilizer would allow and performed one or two sit-ups. He then stopped, but Politowicz told him he needed to do something. So he tried one or two more when he felt a "burning stabbing sensation"; he "cried out in pain" and told Politowicz that something was wrong and that he needed to get help. Politowicz sent a student to the office and the student returned with a wheelchair to assist him. His father eventually came and picked him up.

Hurley saw Meisel on the next day and Meisel noted in his letter that Hurley appeared to have reinjured his knee. The physician wrote that there was a "bloody effusion" after a knee aspiration and an x-ray suggested that Hurley had suffered a "collateral ligament disruption." A later MRI revealed that Hurley's patella had a fracture. Hurley eventually underwent surgery to repair his knee.

Hurley sued the L'Anse Creuse School District and Politowicz for his injuries in April 2011. Specifically, Hurley alleged that Politowicz's decision to order him to perform sit-ups amounted to gross negligence that was the proximate cause of the aggravation of his knee injury. Because the school district was vicariously liable for Politowicz's actions, Hurley maintained that both the school district and Politowicz were liable for the damages he suffered.

In June 2011, the school district moved for summary disposition of Hurley's claim under MCR 2.116(C)(7). The school district argued that Politowicz was clearly acting within the scope of his employment and was engaged in the exercise of a governmental function; as such, it could not be held vicariously liable for his actions unless Hurley established an exception to the immunity provided under MCL 691.1407(1), which he did not do. See *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 625; 363 NW2d 641 (1984) ("A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception.").

Before the trial court held a hearing on this motion, Hurley stipulated to the dismissal of his claim against the school district. The trial court signed an order dismissing the claim against the school district with prejudice on July 29, 2011.

In January 2012, Politowicz also moved for summary disposition under MCR 2.116(C)(7). He argued that, even accepting Hurley's version of events to be true, no reasonable jury could find that Politowicz's decision to require Hurley to perform sit-ups amounted to gross negligence. In addition, relying on a report prepared by Dr. Joseph Walkiewicz, who Politowicz hired to evaluate Hurley, Politowicz contended that the evidence showed that Hurley's need for surgery was actually a result of his initial injury rather than his sit-ups.

At a hearing on Politowicz's motion, the trial court acknowledged that there were competing expert opinions on the matter of causation. It also determined that Hurley had presented sufficient evidence to establish a question of fact as to whether Politowicz's requirement that Hurley perform sit-ups amounted to gross negligence. For that reason, it denied Politowicz's motion for summary disposition premised on governmental immunity on February 6, 2012.

In April 2012, Politowicz again moved for summary disposition. Politowicz argued that, in his prior motion, the trial court neglected to rule on his contention that he was entitled to summary disposition because the evidence showed that Politowicz's actions were not "the" proximate cause of Hurley's injuries. Politowicz again relied on Walkiewicz's report to show that Hurley's sit-ups on the day at issue did not cause his injuries. He also noted that he did not "force" Hurley to perform the sit-ups, and that Hurley "did not vigorously resist the directions to do the sit-ups."

The trial court conceded that it did not directly address Politowicz's original motion for summary disposition to the extent that Politowicz claimed that the evidence showed that his actions were not "the" proximate cause of Hurley's injuries. Nevertheless, it determined that there was a question of fact on the matter of causation. For that reason, in an order signed on April 30, 2012, the trial court denied Politowicz's second motion for summary disposition.

Politowicz now appeals the trial court's orders denying his motions for summary disposition.[2]

[2] In a motion before this Court, Hurley challenged this Court's jurisdiction to hear Politowicz's appeal of right on the ground that he did not file his appeal within 21 days from the trial court's order denying Politowicz's first motion for summary disposition. MCR 7.204(A)(1)(a). This Court denied the motion. However, on further reflection, see *Chen v Wayne State University*, 284 Mich App 172, 191; 771 NW2d 820 (2009) (stating that whether this Court has jurisdiction is always within the scope of this Court's review), we agree that Politowicz's appeal was untimely to the extent that he claimed the trial court erred when it denied his first motion for summary disposition. The trial court's first order was final as to whether Hurley established a question of fact on the issue of gross negligence. See MCR 7.202(6)(a)(*v*). Nevertheless, in the

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of statutes such as the governmental tort liability act. *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006).

B. MCR 2.116(C)(7)

Summary disposition is appropriate where the plaintiff's claim is barred under immunity granted by law. See MCR 2.116(C)(7). The Legislature has provided broad immunity from tort liability to governmental agencies and their employees. See MCL 691.1407; *Robinson v Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000) (stating that the Legislature's grant of immunity is broad and the exceptions to that immunity must be narrowly construed). Indeed, there is a presumption that immunity applies to governmental agencies and employees and it is the plaintiff's burden to plead in avoidance of that immunity. *Mack v Detroit*, 467 Mich 186, 198, 201; 649 NW2d 47 (2002).

> In determining whether a plaintiff's claim is barred because of immunity granted by law, the reviewing court will accept the allegations stated in the plaintiff's complaint as true unless contradicted by documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Although generally not required to do so, see MCR 2.116(G)(3), a party moving for summary disposition under MCR 2.116(C)(7) may support the motion with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider. *Id.*, citing MCR 2.116(G)(5). The reviewing court must view the pleadings and supporting evidence in the light most favorable to the nonmoving party to determine whether the undisputed facts show that the moving party has immunity. *Tryc v Mich. Veterans' Facility*, 451 Mich 129, 134; 545 NW2d 642 (1996). [*Kincaid v Cardwell*, ___ Mich App ___, slip op at 4; ___ NW2d ___ (2013) (Docket No. 310045).]

Once a defendant makes a properly supported motion for summary disposition asserting governmental immunity under MCR 2.116(C)(7), the burden shifts to the plaintiff to show that the governmental agency or employee is not entitled to immunity. See *Kincaid*, ___ Mich App, slip op at 12 and n 6 (holding that the burden shifting approach for questions of fact under MCR 2.116(C)(10) applies to questions of fact concerning immunity provided by law in a motion under MCR 2.116(C)(7)).

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interests of efficiency, we shall consider Politowicz's appeal of that order by leave granted. MCR 7.203(B)(5).

C. GROSS NEGLIGENCE

The Legislature provided that a governmental agency's employee is "immune from tort liability" caused by the employee "while in the course of employment" and "while acting on behalf of a governmental agency," if all the following are true: (1) the employee was "acting or reasonably believe[d that] he or she [was] acting within the scope of his or her authority; (2) the "governmental agency [was] engaged in the exercise or discharge of a governmental function"; and, (3) the employee's "conduct [did] not amount to gross negligence that [was] the proximate cause of the injury or damage." MCL 691.1407(2). Here, there is no dispute that Politowicz was acting within the scope of his authority and was engaged in the discharge of a governmental function. The only dispute centers on whether Politowicz's actions amounted to gross negligence that was the proximate cause of Hurley's injury.

In order to survive a properly supported motion for summary disposition premised on the immunity afforded to governmental employees, the plaintiff must present evidence that would permit a reasonable finder of fact to conclude that the employee was grossly negligent. *LaMeau v Royal Oak*, 289 Mich App 153, 175; 796 NW2d 106 (2010), rev'd not in relevant part 490 Mich 949 (2011). Evidence that the defendant's acts were negligent will not be sufficient to survive such a motion. *Maiden*, 461 Mich at 122-123. Rather, the plaintiff must present evidence that the employee's conduct was substantially more than negligent; *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 411, 716 NW2d 236 (2006); he or she must present evidence that the employee's conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a).

Additionally, as this Court has explained, where there are multiple causes for an injury, the plaintiff must also be able to show that the employee's grossly negligent conduct was the one most efficient cause:

> The Legislature has provided that a governmental employee is immune from tort liability unless his or her conduct amounted "to gross negligence" and that gross negligence was "the proximate cause of the injury or damage." MCL 691.1407(2)(c) (emphasis added). Our Supreme Court has held that the Legislature's reference to "the proximate cause"—as opposed to "a proximate cause"—means that the employee's gross negligence must be more than just a proximate cause of the injury in order to meet the requirements of the exception to the governmental employee's immunity. See [*Robinson*, 462 Mich at 461-463]. Instead, a governmental employee is immune from tort liability unless his or her conduct amounted to gross negligence that was "the one most immediate, efficient, and direct cause of the injury or damage . . . ." *Id.* at 462. [*LaMeau*, 289 Mich App at 181.]

D. APPLYING THE LAW

1. GROSS NEGLIGENCE

In his first motion for summary disposition, Politowicz argued that he was entitled to have Hurley's claim dismissed because, even accepting Hurley's version of events, no reasonable jury could find that Politowicz's actions amounted to gross negligence. Specifically, he contended that merely directing a student to perform sit-ups—as described by Hurley at his deposition—is not sufficient to establish that Politowicz was grossly negligent. This was minimally sufficient to challenge Hurley's ability to support his claim that Politowicz was grossly negligent. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In response to this motion, Hurley cited evidence that showed that Politowicz knew about Hurley's injury, knew that he had restrictions on his ability to use his injured leg, and nevertheless compelled Hurley to perform sit-ups without regard to the possibility that it would harm him.

Hurley testified that, on the first day of school, Politowicz met with Hurley, Hurley's mother, and the principal to talk about his need for accommodations. Although Hurley did not recall the exact conversation, he said that they discussed that he had a knee injury and that he could not do anything with his leg. He also said that it was his expectation that, because this gym class was a weight training class, that he would be able to work out his upper body with weight machines. However, he could not use the machines because they had not yet been set up.

Politowicz allowed Hurley to observe class for a few days, but eventually approached him about performing some physical activity. Rather, than try to find a machine that Hurley could safely use or find some other activity that might be appropriate for Hurley, it appears from Hurley's testimony that Politowicz came to the impromptu decision that Hurley should perform sit-ups. At the time, Hurley was sitting on the bleachers and observing class. He stated that Politowicz appeared to be "fairly upset" and repeatedly threatened to fail him if he did not perform some activity such as sit-ups; he continued to threaten Hurley with a failing grade even though Hurley "told him I should not be doing these things, I could injure myself more." Despite his protestations, Hurley acquiesced in order to "get him off my back." Hurley performed one or two sit-ups with his knees bent to the degree that the immobilizer would permit, but then stopped. However, Politowicz told him that he needed to do more. So Hurley tried again and, at that point, he aggravated his knee injury.

Viewing this testimony in the light most favorable to Hurley, see *Maiden*, 461 Mich at 120, there was evidence from which a reasonable finder of fact could conclude that Politowicz's actions amounted to gross negligence. A reasonable jury could find that Politowicz knew that Hurley had injured his knee and was unable to perform any activity that would place strain on it. It could also conclude that Politowicz ignored these restrictions and required Hurley to perform an activity that plainly required Hurley to bend his knee and place it under strain. Given the evidence that Politowicz did not even try to find an alternate activity that would be appropriate for Hurley, became upset with Hurley over his lack of participation, and then threatened him after he stopped performing sit-ups, a reasonable jury could find that Politowicz acted with a substantial disregard to the possibility that Hurley might be injured if he complied with Politowicz's directives. MCL 691.1407(7)(a). Therefore, the trial court did not err when it

denied Politowicz's motion on the ground that there was a question of fact as to whether Politowicz's actions were grossly negligent.

2. THE PROXIMATE CAUSE

Politowicz also argues that the trial court should have granted his motion for summary disposition because the evidence showed that Politowicz's actions were not the one most immediate, efficient, and direct cause of Hurley's injuries. As a preliminary matter, we note that Politowicz has used imprecise language that appears to conflate whether his actions aggravated Hurley's original injury with whether his actions caused the original injury. In his complaint, Hurley did not allege that Politowicz caused his original injury and he did not seek compensation for the losses occasioned by that injury; rather, he alleged that Politowicz aggravated his pre-existing condition and he sought compensation for the harms he suffered from that aggravation. A defendant can be liable for directly causing an aggravation of a preexisting condition. See *Wilkinson v Lee*, 463 Mich 388, 396-397; 617 NW2d 305 (2000). And, with regard to such cases, whether the plaintiff was at fault for the preexisting injury is irrelevant to determining the cause of the aggravation. See *Taylor v Kent Radiology, PC*, 286 Mich App 490, 515-516; 780 NW2d 900 (2009) (examining a case involving the aggravation of a preexisting foot injury and holding that comparative negligence applies only to the cause of the aggravation and not the cause of the original injury). Accordingly, the only issue here is whether Politowicz's actions were the one most immediate, efficient, and direct cause of the aggravation of Hurley's original injury.

In his motion for summary disposition, Politowicz could properly challenge Hurley's claim by showing that Hurley failed to plead in avoidance of governmental immunity. See *Mack*, 467 Mich at 198. He could also properly support his motion by discussing Hurley's evidence and showing that it was insufficient to avoid immunity or by presenting affirmative evidence that negated an element that was essential to avoid the application of governmental immunity. See *Quinto*, 451 Mich at 362.

Here, there was no issue as to whether Hurley properly pleaded in avoidance of governmental immunity. Moreover, Politowicz did not discuss Hurley's evidence to show that it was insufficient to avoid immunity. Instead, he purported to offer affirmative evidence that his actions—even if found to be grossly negligent—were not the one most efficient cause of Hurley's injury. Because Politowicz's grounds for relief were not apparent on the face of the pleadings, he had to support his motion with affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(a). Further, the evidence had to be admissible before the trial court could consider it for purposes of the motion. See MCR 2.116(G)(6); *Barnard Mfg*, 285 Mich App at 373 (explaining that evidence submitted in support of a motion for summary disposition must be substantively admissible, albeit not necessarily in admissible form).

Politowicz submitted Walkiewicz's report in support of his contention that his actions did not proximately cause Hurley's aggravation. However, this report was clearly hearsay and did not fall under an exception to the general prohibition against the admission of hearsay. See MRE 801; MRE 802; MRE 803; MRE 804; see also *Attorney General v John A Biewer Co, Inc*, 140 Mich App 1, 17-18; 363 NW2d 712 (1985) (noting that documents that are prepared in preparation for litigation are not inherently trustworthy and, for that reason, are generally

inadmissible under the hearsay exceptions). Moreover, the fact that Walkiewicz might be able to testify as to his opinion at trial does not alter the report's admissibility. The statements in a written report are completely different from a statement offered as proposed testimony in an affidavit and the fact that the two different types of evidence might ultimately contain the same statements does not transform an otherwise inadmissible document into admissible evidence for purposes of summary disposition. Rather, as this Court has explained, the substance of the proposed evidence must itself be plausibly admissible. *Barnard Mfg*, 285 Mich App at 373-374. With a medical report there are two levels of hearsay: the document is offered to show that the medical professional actually made the statements contained in the report and then the statements themselves are proffered for their truth. See *Merrow v Bofferding*, 458 Mich 617, 625-626; 581 NW2d 696 (1998). Although the substance of the statements from the report might plausibly be admissible (for example, if adopted in an affidavit), the report itself cannot be used to show that Walkiewicz actually made the statements because—as a document prepared for the litigation—there is no plausible basis for admitting the report. As such, the trial court could not properly consider this report when deciding Politowicz's motion for summary disposition and we will not consider it now.[3] *Barnard Mfg*, 285 Mich App at 373.

Without this report, Politowicz is left with his contention that Hurley was responsible for his own injury because his testimony showed that he failed to warn Politowicz that he could not perform the sit-ups and failed to more vigorously resist Politowicz's directives to perform the sit-ups. Contrary to Politowicz's contention on appeal, Hurley did testify that he told Politowicz that he should not be doing "these things" because he "could injure" himself more. There was also testimony that Politowicz was upset and repeatedly threatened to fail Hurley if he did not acquiesce. From this evidence, a reasonable jury could find that Politowicz compelled Hurley to act and that he did so without regard to the danger to Hurley. Accordingly, there was evidence from which the jury could conclude that Politowicz's decision to compel Hurley to perform sit-ups played a far more significant role than Hurley's decision to not more vigorously resist. Therefore, there was a question of fact on the issue of causation.

The trial court did not err when it denied Politowicz's motion for summary disposition on the grounds that his actions were not the proximate cause of the aggravation of Hurley's injury.

[3] We note that Hurley also submitted a medical report that was apparently prepared for this litigation to prove that Politowicz's actions were the proximate cause of the aggravation of Hurley's injury. However, for the same reasons, we conclude that this report too could not be considered for purposes of the motion for summary disposition.

III. CONCLUSION

The trial court correctly determined that there was a question of fact as to whether Politowicz's actions amounted to gross negligence that was the proximate cause of the aggravation of Hurley's injury. Therefore, the trial court did not err when it denied Politowicz's motions.

Affirmed. As the prevailing party, Hurley may tax his costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Michael J. Kelly